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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

Office: SAN DIEGO, CA
(RELATES)

Date:

MAR 24 2013

IN RE:

APPLICATION:

Application for Permission to Reapply for Admission into the United States after
Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The District Director, San Diego, California denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of service of the unfavorable decision (33 days if mailed). If the decision was mailed, the appeal must be filed within 33 days. See 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. See 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the district director issued the decision on April 13, 2009. It is noted that the district director properly gave notice to the applicant that he had 30 days to file the appeal (33 days if mailed). U.S. Citizenship and Immigration Services (USCIS) received the appeal on May 20, 2009, or 37 days after the decision was issued. Accordingly, the appeal was untimely filed.

Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO or the district director authority to extend the 33-day time limit for filing an appeal. As the appeal was untimely filed, the appeal must be rejected. Nevertheless, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the untimely appeal does not meet the requirements of a motion to reopen or a motion to reconsider because counsel does not set forth any new facts to overcome the applicant's permanent ground of inadmissibility or establish that the district director's decision was based on an incorrect application of law or policy. The AAO notes that, while counsel asserts that the applicant's conviction is not an aggravated felony, the record clearly reflects that the applicant's conviction under section 11360(a) of the California Health and Safety Code (CHSC) qualifies as an aggravated felony.¹ While counsel contends that the applicant is eligible for treatment as a first time offender

¹ Counsel's contentions are unpersuasive. Counsel cites to cases that do not refer to the section of the California code under which the applicant was convicted. While *U.S. v. Rivera-Sanchez*, 247 F. 3d 905 at 908-9 (9th Cir. 2001) holds that a conviction under section 11360(a) does not facially render an applicant convicted of an aggravated felony, the indictment to which the applicant pled guilty clearly reflects that the applicant was not convicted of "solicitation," but of "unlawfully transport, offer, **and** attempt to transport more than 28.5 grams of marijuana." As such, the AAO finds that the applicant has been convicted of an aggravated felony.

under *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the record reflects that the applicant does not qualify for such treatment and the applicant's conviction under section 11360(a) is a conviction for immigration purposes.² While counsel contends that the applicant has not been convicted of a crime involving moral turpitude because a conviction under section 11360(a) of the CHSC is not categorically a crime of moral turpitude because it penalizes transportation incidental to personal use, the applicant's conviction clearly reflects that the indictment to which the applicant pled guilty did not include transportation for personal use.³ Therefore, there is no requirement to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

As the appeal was untimely filed and does not qualify as a motion, the appeal must be rejected.

ORDER: The appeal is rejected.

² Beyond the decision of the district director, the AAO finds that the applicant is inadmissible under the provisions of section 212(a)(2)(A)(i)(II) of the Act and no waiver is available to him. The AAO finds that the applicant is not eligible for treatment as a first time offender under *Lujan-Armendariz*. The applicant pled guilty to and was convicted of more than simple possession. Even though during the expunging of the applicant's conviction the court set aside the conviction and dismissed alternative charges in violation of section 11357(a)(2) of the CHSC, the record does not reflect that these are the charges to which the applicant pled guilty or for which the applicant received sentencing. Furthermore, the record does not establish that the court, in expunging the applicant's conviction, found that his rights were violated and the charges against him should be dismissed accordingly. There is no evidence to establish that the applicant's conviction was expunged for any other legal reason other than he had completed his sentence. As such, the applicant's conviction under section 11360(a) of the CHSC is a conviction for immigration purposes under section 101(a)(48) of the Act. The AAO finds that the applicant is ineligible for treatment as a first-time offender and is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime related to a controlled substance. The Act makes it clear that a section 212(h) waiver is not available to an alien who has been convicted of a crime related to a controlled substance which is more than *simple possession* of 30g of marijuana. In this case, the applicant was convicted of unlawfully transport, offer, and attempt to transport marijuana in the amount of 28.5 grams. The applicant is, therefore, ineligible for waiver consideration. Therefore, the applicant is mandatorily inadmissible to the United States and no purpose would be served in the favorable exercise of discretion in adjudicating an application to reapply for admission into the United States.

³ Beyond the decision of the district director, the AAO finds that the applicant is inadmissible under the provisions of section 212(a)(2)(C) of the Act and no waiver is available. The indictment to which the applicant pled guilty clearly reflects that there is sufficient evidence to reasonably believe that the applicant has been involved in illicit trafficking of a controlled substance. The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).